MEGASTEEL SDN BHD

v.

PERWAJA STEEL SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: W-02-16-2008]
17 JANUARY 2008

CIVIL PROCEDURE: *Injunction - Injunction to restrain winding-up petition - Principles applicable - Whether reasonable tribunal would have granted injunction sought*

COMPANY LAW: *Winding up - Injunction to restrain petition - Principles applicable - Whether reasonable tribunal would have granted injunction sought*

The appellant, asserting that the respondent had broken its contract to deliver the total amount of Direct Reduced Iron within the agreed time, gave notice to the respondent that it intended to recover damages for breach of contract. The appellant filed its suit claiming for, *inter alia*, RM36,079,860.33 for breach of contract. Before it could serve its writ, the respondent, purporting to exercise its right under s. 218(2)(a) of the Companies Act 1965, served on the appellant a statutory notice of demand for a sum of RM3,390,509.03 which it claimed was owed to it. The appellant then instituted a second action ('anti-suit action') against the respondent seeking to restrain the presentation of a winding up petition against it. The respondent filed its defence to the anti-suit action and added a counterclaim for RM3,390,509.03, which was the sum demanded under the statutory notice. The appellant then applied to the High Court for an interlocutory injunction in the anti-suit action. The High Court dismissed the application, resulting in the present appeal.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) A creditor, generally speaking, does not have to obtain judgment before instituting winding up proceedings against a company. However, if the statutory notice is issued for a

collateral purpose or if the presentation of the winding up petition would constitute an abuse of process or if the debt in question was substantially disputed, then a court of equity may, in the exercise of its specific relief injunction, injunct the putative petitioner from presenting a winding up petition. Those principles applied to the facts of the instant appeal. Whether there was a breach of contract committed by the respondent was a serious question that required investigation at a trial. From a reading of the affidavits, it was clear that there was a marked conflict as to the events that transpired between the parties with regard to the question that lay in the axis of the dispute. On one hand, the respondent said that the sum of RM3,390,509.03 was undoubtedly due to it while on the other hand, the appellant claimed that not all the goods that were supposed to be supplied to it arrived. It was impossible at this stage to resolve this dispute based on affidavit evidence. It was also highly unsuitable for this dispute to be resolved in a winding up proceeding based on the particular facts. There were already two actions and a counterclaim before the High Court. Hence, it was appropriate that these issues be tried and disposed of in those suits. Having addressed the arguments in this appeal carefully, it was apparent that the judicial commissioner fell into error when she exercised her discretion against the appellant. A reasonable tribunal armed with the facts of this case and directing its mind to the applicable principles would have granted the injunction sought. (paras 3, 4 & 6)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memberi notis kepada responden menyatakan hasrat untuk menuntut gantirugi kerana kemungkiran kontrak, dengan mendakwa bahawa responden telah memungkiri janji untuk membekalkan seluruh jumlah Direct Reduced Iron kepadanya dalam tempoh tertentu. Berikutnya, perayu memfail guaman antara lain untuk menuntut sejumlah RM36,079,860.33 kerana kemungkiran kontrak. Bagaimanapun, sebelum writ sempat diserahkan, responden, bertindak di bawah s. 218(2)(a) Akta Syarikat 1965, telah menyerahkan notis statutori kepada perayu dan menuntut RM3,390,509.03 yang didakwa terhutang

kepadanya. Perayu kemudian memfailkan tindakan kedua ('tindakan anti-suit') terhadap responden bertujuan menghalang penyerahan petisyen penggulungan ke atasnya. Responden memfailkan pembelaan terhadap tindakan anti-suit dan sekaligus menyertakan tuntutan balas sebanyak RM3,390,509.03, iaitu jumlah sama yang dituntut di bawah notis statutori. Perayu membalas dengan memohon kepada Mahkamah Tinggi untuk injunksi interlokutori di dalam tindakan anti-suit. Mahkamah Tinggi menolak permohonan mengakibatkan rayuan perayu di sini.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Secara amnya, seorang pemiutang tidak perlu memperoleh apa-apa penghakiman sebelum boleh memfailkan prosiding penggulungan terhadap sesebuah syarikat. Bagaimanapun, jika notis statutori dikeluarkan untuk maksud kolateral, atau jika pengemukaan petisyen penggulungan merupakan satu salahguna proses, atau jika hutang berkenaan secara substantifnya dipertikai, maka sebuah mahkamah ekuiti boleh, dalam melaksanakan injunksi relif spesifiknya, menghalang seorang pempetisyen putatif dari mengemukakan petisyen penggulungannya. Prinsip-prinsip ini terpakai kepada fakta rayuan di sini. Sama ada wujud satu kemungkiran kontrak oleh responden adalah satu persoalan serius yang perlu disiasat di perbicaraan. Meneliti afidavit-afidavit menunjukkan dengan jelas bahawa terdapat pertikaian ketara mengenai peristiwa-peristiwa yang berlaku kepada pihak-pihak berkaitan persoalan yang menunjangi pertikaian di antara mereka. Di satu pihak, responden menyatakan bahawa jumlah RM3,390,509.03 adalah terhak kepadanya, dan dipihak yang lain, perayu mendakwa bahawa tidak semua barangan yang sepatutnya dibekalkan sampai kepadanya. Adalah mustahil di peringkat ini untuk menyelesaikan pertikaian dengan berdasarkan keterangan-keterangan afidavit. Adalah juga amat tidak sesuai untuk pertikaian ini diselesaikan melalui prosiding penggulungan berdasarkan fakta-fakta khusus kes ini. Kini terdapat dua guaman sivil dan satu tuntutan balas di hadapan Mahkamah Tinggi. Oleh itu, adalah wajar bahawa isu-isu ini dibicarakan di dalam guaman-guaman tersebut. Menimbang dengan teliti

A hujah-hujah yang dikemukakan di rayuan, jelas bahawa pesuruhjaya kehakiman khilaf bilamana melaksanakan budibicaranya dengan tidak berpihak kepada perayu. Sebuah tribunal yang munasabah, berbekalkan fakta-fakta kes di sini dan dengan menghalakan pemikirannya kepada prinsip-prinsip
B terpakai, akan membenarkan injunksi yang dipohon.

[Perintah sekadarnya.]

Case(s) referred to:

Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation [1978] VR 83 ***(refd)***
C
Mann v. Goldstein [1968] 2 All ER 769 ***(refd)***
Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(refd)***
Stonegate Securities Ltd v. Gregory [1980] 1 Ch 576 ***(refd)***
D *Syarikat Bunga Raya Timor Jauh Sdn Bhd v. Tractors Malaysia Bhd [1980] 2 MLJ 127* ***(refd)***
Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***

Legislation referred to:

E Companies Act 1965, s. 218(2)(a)
Courts of Judicature Act 1964, s. 44

For the appellant - Dato' Loh Siew Cheang (Cindy Goh Joo Seong & Keith Goh Hong Yin with him); M/s Cheang & Ariff
For the respondent - Paul Ong Teng Kek (Lim Sook Yee with him); M/s Paul
F *Ong & Assoc*

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D2-22-1594-2007]

Reported by Suresh Nathan

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JUDGMENT

Gopal Sri Ram JCA:

H **[1]** This morning, we have a motion before us for an interim injunction pending appeal. It was sought under s. 44 of the Courts of Judicature Act 1964. By consent of the parties, we directed the motion to be treated as the appeal proper as this would dispose of the substantive dispute without further delay.
I We have ample power to do so. See *Syarikat Bunga Raya Timor*

Jauh Sdn Bhd v. Tractors Malaysia Bhd [1980] 2 MLJ 127; *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122. A

[2] This case has a history. It arises out of an assertion by the instant appellant that the respondent broke its contract to deliver the total amount of Direct Reduced Iron within the agreed time. The appellant gave notice to the respondent that it intended to recover damages for breach of contract. The appellant filed its suit claiming for, *inter alia*, RM36,079,860.33 for breach of contract. Before it could serve its writ, the respondent purporting to exercise its right under s. 218(2)(a) of the Companies Act 1965, served on the appellant a statutory notice of demand for a sum of RM3,390,509.03 which it claimed was owed to it ("the statutory notice"). The appellant then instituted a second action ("the anti-suit action") against the respondent seeking to restrain the presentation of a winding up petition against it. The respondent filed its defence to the anti-suit action and added a counterclaim for RM3,390,509.03 which is the sum demanded under the statutory notice. The appellant then moved the High Court in chambers by summons for an interlocutory injunction in the anti-suit action. The High Court after hearing arguments dismissed the summons in chambers. The appellant then appealed to this court. B C D E

[3] The principles governing an application of this nature are not in dispute. They are well settled. A creditor, generally speaking, does not have to obtain judgment before instituting winding up proceedings against a company. That is the purpose for which s. 218(2)(a) of the Companies Act 1965 was enacted. However, if the statutory notice is issued for a collateral purpose or if the presentation of the winding up petition would constitute an abuse of process or if the debt in question is substantially disputed, then a court of equity may, in the exercise of its specific relief jurisdiction, injunct the putative petitioner from presenting a winding up petition. See *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83; *Mann v. Goldstein* [1968] 2 All ER 769; *Stonegate Securities Ltd v. Gregory* [1980] 1 Ch 576; *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305. The issue here is whether those principles apply to the facts of the instant appeal. We think they do. F G H I

[4] Whether there was a breach of contract committed by the respondent is a serious question that requires investigation at a trial. From a reading of the affidavits, it is clear that there is a marked conflict as to the events that transpired between the parties with regard to the question that lies in the axis of the dispute. On one hand, we have the respondent saying that the sum of RM3,390,509.03 is undoubtedly due to it. On the other hand, the appellant claims that not all the goods that were supposed to be supplied to it arrived. It is impossible at this stage to resolve this dispute based on affidavit evidence. It is also wholly unsuitable in our judgment, for this dispute to be resolved in a winding up proceeding based on the particular facts. There are already two actions and a counter-claim before the High Court. We think it is appropriate that these issues be tried and disposed of in those suits.

[5] We are conscious of the fact that this appeal is directed against the discretionary power of the High Court. An order in granting or refusing an injunction is made in the exercise of equitable discretion. An appellate court will not generally interfere with the exercise of such a discretion save on exceptional grounds. If the High Court had asked itself the wrong question or failed to take into account relevant considerations or failed to consider or appreciate the evidence before it, or had taken into account irrelevant considerations then this court is entitled to interfere. We have said so in a number of cases and we consider the citation of these to be quite unnecessary.

[6] Having addressed the arguments in this appeal carefully, we are satisfied that the learned judicial commissioner fell into error when she exercised her discretion against the appellant. We are further satisfied that a reasonable tribunal armed with the facts of this case and directing its mind to the applicable principles would have granted the injunction sought. We therefore have no alternative but to interfere.

[7] For the reasons given, this appeal is allowed and the orders of the High Court are set aside. There shall be an order in terms of the appellant's summons in chambers dated 22 November 2007. We further order that the respondent pays the costs of this appeal and those incurred in the High Court to the appellant. The deposit in court is to be refunded to the appellant.

[8] We will also make the following consequential orders. We direct that the two suits be consolidated without further application. We also direct an early trial of the consolidated suits and that the parties to appear before the learned judge of Commercial Court 8 of the High Court at Kuala Lumpur at 9am tomorrow morning to obtain directions for the further conduct of the consolidated suits.